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IN THE

Supreme Court Of The United States

October Term, 1996

CORNELL D. CORNISH,

Petitioner,

vs.

DISTRICT OF COLUMBIA COURT OF APPEALS, *et al.*,

Respondents.

On Petition for a Writ of Certiorari
to the District of Columbia Court of Appeals

BRIEF FOR DISTRICT OF COLUMBIA BOARD ON PROFESSIONAL RESPONSIBILITY IN OPPOSITION

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QUESTION PRESENTED

Whether the District of Columbia Court of Appeals correctly imposed an order of interim suspension upon Petitioner, pending review and determination of appropriate final discipline, based upon an order of the Maryland Court of Appeals directing his indefinite suspension from the Maryland Bar on the ground of a medical disability.

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OPINION BELOW

The order of the District of Columbia Court of Appeals dated April 15, 1996, directing Petitioner's interim suspension pending the determination of final discipline and denying various motions of Petitioner (Pet. App. 14a), is unpublished.

JURISDICTION

The order of the court of appeals for which review is sought was entered April 15, 1996. Petitioner filed a motion for reconsideration, which the court denied by order entered May 23, 1996. Petitioner filed his petition for writ of certiorari on or about July 31, 1996 (the precise date is unknown to Respondents). Jurisdiction is asserted under various inapplicable statutes.

STATUTE AND RULES

The pertinent statute conferring jurisdiction on the court of appeals to discipline members of its Bar, and relevant rules of professional conduct and of procedure prescribed by the Board on Professional Responsibility, are set out in an Appendix to this brief.

STATEMENT OF PROCEEDINGS BELOW

Petitioner is a member of the Bar of the District of Columbia Court of Appeals, having been admitted on motion on November 4, 1982. He also is a member of the Bar of Maryland. On December 1995, he was placed on inactive status by order of the Court of Appeals of Maryland (the "Maryland Court"). *Attorney Grievance Commission v. Cornish*, Miscellaneous Docket (Subtitle BV) No. 39 (Sept. Term, 1995) (Pet. App.10a).[1]

The order placing Petitioner on inactive status was reported to the District of Columbia Court of Appeals. On April 15, 1996, the court entered an order suspending Petitioner pursuant to D.C. App. R. XI, § 11(d). The court directed the Board on Professional Responsibility (the "Board") to recommend promptly whether reciprocal discipline should be imposed or whether the Board, instead, elected to proceed *de novo* (Pet. App. 14a). The court also denied Petitioner's motions to amend the order to reflect his change of name and to permit him to remove his name voluntarily from the register of attorneys admitted to practice in the District of Columbia.

On May 23, 1996, the court denied Petitioner's motion for reconsideration of its April 15, 1996 order (Pet. App. 11a).[2]

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[1] Throughout the proceedings below, Petitioner is referred to as the "Respondent."

[2] On July 16, 1996, the Board filed its report, recommending that the court of appeals impose reciprocal discipline of indefinite suspension with

ARGUMENT

1. The order of the court below plainly is correct and does not warrant this Court's review. The record in Maryland demonstrated that Petitioner was the subject of a complaint concerning the handling of a patent application. Petitioner admitted that he suffered lasting effects from surgery and participated in Al Anon. He further admitted that he was unable to cope with the demands of law practice and had no wish to do so. Maryland Bar Counsel and Petitioner agreed that Petitioner should be placed on inactive status.

Under D.C. App. R. XI, § 11(b), the District of Columbia Bar Counsel is required to submit certified copies of "all orders of discipline from other disciplining courts." The Maryland Court of Appeals is a disciplining court with authority to suspend or disbar. *See* D.C. App. R. XI, §11(a). The Maryland rules equate orders of suspension and disbarment with orders placing attorneys on inactive status. Md. Rule BV 13a1. In either event, the Clerk of the Maryland Court "shall strike the name of the attorney from the register. . . ." The burden is on Petitioner to terminate his inactive status. Rule BV 14. Thus, the Maryland order constitutes discipline for purposes of Rule XI. *In re O'Brien*, 665 A.2d 662 (D.C. 1995) (per curiam); *In re Samuels*, 648 A.2d 943 (D.C. 1994) (per curiam).

Reciprocal (*i.e.*, identical) discipline is imposed unless the attorney demonstrates, by clear and convincing evidence, that one or more of the exceptions enumerated in Rule XI applies. D.C. App. R. XI, § 11(c). Here, Maryland followed a procedure similar to that prescribed in D.C. App. R. XI, §§ 13(b) & (c). While under investigation for misconduct, Petitioner sought and was granted inactive status. The Mary-

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reinstatement conditioned upon a showing of fitness pursuant to D.C. App. R. XI, § 13(e).

land Court concluded that Petitioner's health problems mandated inactive status.

In an original case arising under D.C. App. R. XI, § 13, a disability suspension would be appropriate on this record. *See In re Samuels, supra.* With due deference to Maryland's determination to place Petitioner on inactive status for health reasons, reciprocal discipline is appropriate. *In re Gardner*, 650 A.2d 693 (D.C. 1994); *In re Zilberberg*, 612 A.2d 832 (D.C. 1992); *In re Velasquez*, 507 A.2d 145 (D.C. 1986) (per curiam) (articulating standard of deference to foreign jurisdiction's factual findings in reciprocal discipline matters).

2. Petitioner also appears to complain that the court of appeals denied his motion to change his name to include "Judge" on the court's order. The court's order bears Petitioner's name as it is reflected in the records of the District of Columbia Bar, based upon Petitioner's registration statement. Although Petitioner secured an order of the District of Columbia Superior Court changing his name in September 1990, the court was not required to ignore the Bar's records in administering its rules governing the Bar's members.

3. To the extent that Petitioner appears to complain of the actions of the Maryland Court, the present proceeding is not an appropriate occasion to litigate the merits of the Maryland Court's order. As we understand that order, Petitioner is free to seek reinstatement to active membership before the Maryland Court at any time. If he obtains a vacatur of the Maryland Court's order of suspension, he may apply for removal of his disability suspension in the District of Columbia. *In re Chisholm*, No. 94-BG-818 (D.C. Mar. 7, 1995).

4. In any event, this Court is without jurisdiction to consider the order for which review is sought. Under 28 U.S.C. § 1257(a), "*final* judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari" (emphasis

added).[3] The order of the court of appeals is interlocutory in form and function. The order imposes an interim suspension upon Petitioner, pending the report and recommendation of the Board and the court's further consideration of appropriate final discipline. *See* D.C. App. R. XI, § 11. The Board now has filed its recommendation, and the matter is before the court of appeals for its final determination.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: August, 1996

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[3] For purposes of Section 1257, the term "highest court of a State" includes the court below. 28 U.S.C. § 1257(b).

[4] In *Richardson v. District of Columbia Court of Appeals*, 83 F.3d 1513 (D.C. Cir. 1996), where the attorney brought a purported federal Civil Rights Act action to challenge a similar order of interim suspension, the federal court of appeals, in upholding the district court's dismissal of the civil complaint, concluded that the lower court could not entertain the complaint consistently with the *Rooker-Feldman* doctrine, whether the order sought to be reviewed was characterized as interlocutory or final. *See District of Columbia v. Feldman*, 460 U.S. 462, 476 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415 (1923).

STATUTES AND RULES

District of Columbia Code, Sec. 11-2502:

> "The District of Columbia Court of Appeals may censure, suspend from practice, or expel a member of its bar for crime, misdemeanor, fraud, deceit, malpractice, professional misconduct, or conduct prejudicial to the administration of justice. A fraudulent act or misrepresentation by an applicant in connection with this application or admission is sufficient cause for the revocation by the court of such person's admission." (July 29, 1970, 84 Stat. 521, Pub. L. 91-358, title I, Sec. 111; 1973 Ed., Sec. 11-2502; June 13, 1994, Pub. L. 103-266, Sec. 1(b)(112), 108 Stat. 713.)

District of Columbia Court of Appeals Rule XI Governing the Bar, Sec. 11:

> RECIPROCAL DISCIPLINE
>
> (a) DEFINITION
>
> As used in this section, "disciplining court" shall include any court of the United States as defined in Title 28, Section 451 of the United States Code, the highest court of any state, territory, or possession of the United States, and any other agency or tribunal with authority to disbar or suspend an attorney from the practice of law in any state, territory, or possession of the United States.
>
> (b) NOTIFICATION
>
> It shall be the duty of Bar Counsel to obtain copies of all orders of discipline from other disciplining courts. Upon learning that an attorney subject to the disciplinary jurisdiction of this Court has been disciplined by another disciplining court, Bar Counsel shall obtain a certified copy of the disciplinary order and file it with the Board and with this Court. In addition, any attorney

subject to the disciplinary jurisdiction of this Court, upon being subjected to professional disciplinary action by a disciplining court outside the District of Columbia or by anther court in the District of Columbia, shall promptly inform Bar Counsel of such action.

(c) STANDARDS FOR RECIPROCAL DISCIPLINE

Reciprocal discipline shall be imposed unless the attorney demonstrates, by clear and convincing evidence, that:

(1) The procedure elsewhere was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

(2) There was such infirmity of proof establishing the misconduct as to give rise to the clear conviction that the Court could not, consistently with its duty, accept as final the conclusion on that subject; or

(3) The imposition of the same discipline by the Court would result in grave injustice; or

(4) The misconduct established warrants substantially different discipline in the District of Columbia; or

(5) The misconduct elsewhere does not constitute misconduct in the District of Columbia.

Unless there is a finding by the Board under (1), (2), or (5) above that is accepted by the Court, a final determination by a disciplining court outside the District of Columbia or by another court in the District of Columbia that an attorney has been guilty of professional misconduct shall conclusively establish the misconduct for the

purpose of a reciprocal disciplinary proceeding in this Court.

(d) TEMPORARY SUSPENSION AND SHOW CAUSE ORDER

Upon receipt of a certified copy of an order demonstrating that an attorney subject to the disciplinary jurisdiction of this Court has been suspended or disbarred by a disciplining court outside the district of Columbia or by another court in the District of Columbia, the Court shall forthwith enter an order suspending the attorney from the practice of law in the District of Columbia pending final disposition of any reciprocal disciplinary proceeding, and directing the attorney to show cause within thirty days form the date of the order why the identical discipline should not be imposed. The attorney's response to the order to show cause shall be filed with the Board, which for good cause shown may extend the time for filing a response for a period not to exceed thirty days.

(e) RECOMMENDATION BY THE BOARD

Promptly after the attorney's response to the order to show cause is filed or, if no response is filed, promptly after the time for filing a response has expired, the Board shall recommend to the Court whether reciprocal discipline should be imposed. If no order to show cause has been issued, the Board shall recommend to the Court whether reciprocal discipline should be imposed promptly after receiving a certified copy of an order demonstrating that an attorney subject to the disciplinary jurisdiction of this Court has been subjected to professional disciplinary action, other than suspension or disbarment, by a disciplining court outside the District of Columbia or by another court in the District of Columbia. A copy of the Board's recommendation shall be served on the attorney. If the Board recommends to the

Court that reciprocal discipline be imposed, the attorney may file with the Court, within thirty days after service of the Board's recommendation, an opposition to the recommendation stating specific reasons why the imposition of reciprocal discipline would be unwarranted.

(f) ACTION BY THE COURT

(1) When no opposition to the recommendation of the Board has been timely field, and when the Court does not direct that the matter be considered under paragraph (2) of this subsection, the Court will enter an order imposing the discipline recommended by the board upon the expiration of the time permitted for filing a opposition.

(2) In matters not falling under paragraph (1) of this subsection the Court shall impose the identical discipline unless the attorney demonstrates, or the Court finds on the face of the record on which the discipline is predicated, by clear and convincing evidence, that one or more of the grounds set forth in subsection (b) of this section exists. If the Court determines that the identical discipline should not be imposed, it shall enter such order as it deems appropriate, including referral of the matter to the Board for its further consideration and recommendation.

(g) ACTION WHEN RECIPROCAL DISCIPLINE IS NOT RECOMMENDED

If the Board concludes that reciprocal discipline should not be imposed, it shall accept the facts found by the disciplining court unless it has made a finding under

(1), (2), or (5) of subsection (b) of this section. In the absence of such a finding, the Board shall either: (Added (9/1/89)

(1) report to the Court its recommendation as to the appropriate discipline, or (Added 9/1/89)

(2) refer the matter to a Hearing Committee for its recommendation as to the appropriate discipline, or (Added 9/1/89)

(3) direct Bar Counsel to instutute such proceedings as may be appropriate. (Added 9/1/89)

A copy of the Board's decision shall be served on the attorney. If the Board makes a recommendation to the Court under (1) above, the attorney may, within thirty days after service, file with the Court an opposition to the recommendation stating specific reasons why the imposition of reciprocal discipline would be unwarranted. If the Board makes a recommendation to the Court under (1) or directs Bar Counsel to institute proceedings under (3) above, Bar Counsel may, within thirty days after service, file with the Court exceptions to the decision of the Board. (Added 9/1/89)

(h) EFFECT OF STAY OF DISCIPLINE BY DISCIPLINING COURT

If at any time the discipline imposed outside the District of Columbia or by another court in the District of Columbia is stayed, any reciprocal discipline imposed by this Court or by the Board shall be deferred until the stay expires. (Added 9/1/89)

District of Columbia Court of Appeals Rule XI Governing the Bar, Sec. 13:

INCOMPETENT AND INCAPACITATED ATTORNEYS

(a) MENTALLY DISABLED ATTORNEYS

When an attorney has been judicially declared to be mentally incompetent or has been involuntarily committed to a mental hospital as an inpatient, the Court upon proper proof of that fact, shall enter an order suspending that attorney from the practice of law for an indefinite period until further order of the Court. The suspension shall be effective immediately. A copy of the order shall be served upon the attorney, the attorney's guardian, and the director of the mental hospital, if any, in such manner as the Court may direct. If at any time thereafter the attorney is judicially declared to be competent or discharged from inpatient status in the mental hospital, the Court may dispense with further evidence that the disability has ended and may direct the attorney's reinstatement to the practice of law upon such terms as it deems appropriate.

(b) APPLICATION FOR MEDICAL EXAMINATION

If, at any time prior to its final disposition of a disciplinary proceeding, the Board has good cause to believe that the mental or physical condition of the attorney is relevant to the subject matter of the complaint and is a factor which should be considered in the pending proceeding, the Board shall direct Bar Counsel to apply to the Court for an order requiring the attorney to submit the an appropriate examination. The application shall be by petition, with notice to the attorney, and shall be accompanied by a statement from Bar Counsel setting forth

in detail the reasons for the application and the relevance of the examination to the pending proceeding.

(c) ATTORNEYS WHO MAY BE INCAPACITATED

If the Board has reason to believe that an attorney is incapacitated from continuing to practice law because of mental infirmity or illness or because of addiction to drugs or intoxicants, the Board may petition the Court to determine whether the attorney is so incapacitated. Upon the filing of the Board's petition, the court may take or direct such action as it deems appropriate, including the examination of the attorney by such qualified medical expert or experts as it shall designate. If the Court concludes that the attorney is incapacitated from continuing to practice law, it shall enter an order suspending the attorney on the ground of such disability for an indefinite period, effective immediately and until further order of the Court, and any pending disciplinary proceeding against the attorney shall be held in abeyance. In a case of addiction to drugs or intoxicants, the Court alternatively may consider the possibility of probationary conditions. The Court may provide for such notice to the attorney of proceedings in the matter as it deems appropriate and may appoint counsel to represent the attorney if it determines that the attorney is without adequate representation

(d) BURDEN OF PROOF

In a proceeding under this section seeking an order of suspension, the burden of proof shall be upon the Board. In a proceeding under this section an order terminating a suspension, the burden of proof shall be upon the suspended attorney.

(e) CLAIM OF DISABILITY BY ATTORNEY

If, in the course of a disciplinary proceeding, the attorney claims to be suffering from a disability because of mental or physical illness or infirmity, or because of addition to drugs or intoxicants, which makes it impossible for the attorney to present an adequate defense, the Court shall enter an order immediately suspending the attorney from the practice of law until determination is made of the attorney's capacity to practice law in a proceeding under subsection (c) of this section.

(f) ACTION BY THE COURT WHEN ATTORNEY IS NOT INCAPACITATED

If, in the course of a proceeding under this section or a disciplinary proceeding, the Court determines that the attorney is not incapacitated from practicing law, it shall take such action as it deems appropriate, including the entry of an order directing the resumption of the disciplinary proceeding against the attorney.

(g) REINSTATEMENT OF INCAPACITATED ATTORNEY

An attorney suspended under this section may apply for reinstatement once a year, or at such shorter intervals as the Court may direct in its order of suspension or any modification thereof. Upon the filing of such application, the Court may take or direct such action as it deems appropriate, including the examination of the attorney by such qualified medical experts as the Court shall designate. In its discretion, the Court may direct that the expense of such an examination shall be paid by the attorney, and that evidence be presented establishing proof of the attorney's competence and learning in the law, which may include certification by the bar examin-

ers of the attorney's successful completion of an examination for admission to practice. An application for reinstatement under this subsection shall be granted by the Court upon a showing by the attorney, by clear and convincing evidence, that the disability has ended and that the attorney is fit to resume the practice of law.

(h) WAIVER OF DOCTOR-PATIENT PRIVILEGE

The filing of an application for reinstatement under subsection (g) of this section shall constitute a waiver of any doctor-patient privilege with respect to any treatment of the attorney during the period of disability. The attorney shall disclose the name and address of every physician by whom, and every hospital in which, the attorney has been examined or treated since the suspension and shall furnish to the Court written consent to each to divulge such information ad records as may be required by Court-appointed medical experts.